

RECEIVED

JUL 17 1997

BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, DC 20554

In the Matter of )  
 )  
Petition for Rulemaking to Amend ) RM No. 9097  
47 C.F.R. § 76.1003 — Procedures for )  
Adjudicating Program Access Complaints )

REPLY COMMENTS OF BELL ATLANTIC AND NYNEX

The cable industry asserts there is no evidence of its disregard for the Commission's program access rules, and thus no basis for a rulemaking to improve compliance. One of the parties making this claim is Rainbow Media Holdings, Inc. ("Rainbow"), a vertically integrated cable programmer.<sup>1</sup> Ironically, however, the Cable Services Bureau determined just last week that Rainbow blatantly discriminated against Bell Atlantic Video Services ("BVS"), confirming the existence of a very real problem the Commission should address.

The Cable Services Bureau found in a decision released on July 11, 1997, that Rainbow unlawfully refused to sell SportsChannel New York to BVS in Dover Township, New Jersey.<sup>2</sup> The Bureau dismissed Rainbow's purported justification for refusing to sell the programming — that Rainbow is suing a different subsidiary of Bell Atlantic Corporation on another issue — as

No. of Copies rec'd \_\_\_\_\_  
List A B C D E

<sup>1</sup> See Rainbow Media Holdings, Inc.'s Opposition to Ameritech New Media, Inc.'s Petition for Rulemaking (filed July 2, 1997).

<sup>2</sup> Memorandum Opinion and Order, Bell Atlantic Video Servs. Co. v. Rainbow Programming Holdings, Inc., DA 97-1452, CSR-4983-P (rel. July 11, 1997) ("Dover Township Order").

No. of Copies rec'd \_\_\_\_\_  
List A B C D E

“a separate, unrelated dispute” that could not in any event support denial of access to satellite cable programming.<sup>3</sup>

BVS and NYNEX Corporation applaud the Bureau for acting speedily in response to BVS’ complaint. Yet, having prevailed on its claim, BVS is back where it started, trying to negotiate an agreement with Rainbow. Rainbow has already delayed BVS’ ability to present important sports programming<sup>4</sup> and caused BVS to incur substantial legal expenses, thereby placing serious burdens on a new entrant that is attempting to compete with the entrenched cable operator.

While correct as to Rainbow’s violation, the Bureau’s decision does not discourage Rainbow from continuing to behave in an anticompetitive manner. Rainbow faces no damages liability to BVS, no administrative fines, and no other financial penalty. The Bureau has declined to impose any sanctions at this time, stating it “will not foreclose the imposition of appropriate administrative remedies, including forfeitures, should Defendants fail to comply with the [Bureau’s order to abide by the program access rules].”<sup>5</sup> If Rainbow now complies with the Dover Township Order, it will have successfully delayed BVS’ access to sports programming by nearly a year and raised BVS’ costs of entering the market. Just as troubling, Rainbow could ignore this Order as it has ignored the Commission’s rules in the past, in which case BVS would have to go before the Commission once again, incurring still greater expense and delay, in order to secure the programming to which it is entitled. All the while, BVS would remain

---

<sup>3</sup> Id. ¶ 25.

<sup>4</sup> See id. ¶ 8.

<sup>5</sup> Id. ¶ 30.

competitively disadvantaged in Dover Township and consumers would be denied the benefits of more vigorous competition — just as Rainbow intends.

Because it comes out ahead even when found to have violated the rules, Rainbow evidently has decided that disregarding the law makes good business sense. The Dover Township Order is the second formal finding of an unlawful refusal to sell SportsChannel New York.<sup>6</sup> Americast likewise has alleged discrimination by Rainbow that is the subject of a pending program access complaint,<sup>7</sup> and Rainbow has been accused in numerous other complaints of unlawful refusals to sell programming to, or discrimination against, new entrants.<sup>8</sup>

Rainbow is a confirmed repeat offender and there is strong reason to believe it has adopted a policy of violating the program access rules in order to maintain the cable industry's competitive advantage. This Commission should establish penalties that will stop such systematic violations. Otherwise, cable programmers will have little incentive to conform their conduct to the law, and Congress' goal of protecting and promoting new video distribution competition through the program access rules will be frustrated.<sup>9</sup> Penalties would lighten the

---

<sup>6</sup> In 1995, the Commission found that SportsChannel New York unreasonably denied its programming to CellularVision, another new entrant that sought to compete with cable. CellularVision of New York, L.P. v. SportsChannel Assocs., 10 FCC Rcd 9273 (1995), recon. denied, 11 FCC Rcd 3001 (1996).

<sup>7</sup> See Comments of Americast in Support of Petition for Rulemaking of Ameritech New Media, Inc. at 6-7 (filed July 2, 1997).

<sup>8</sup> See, e.g., Third Annual Report, Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, FCC 96-496, CS Dkt. No. 96-133, at App. H (rel. Jan. 2, 1997) (discussing complaints as of 1996).

<sup>9</sup> See Dover Township Order ¶ 16 (discussing purposes of program access rules).

administrative burden on the Commission as well: without sanctions, there is no reason why a programmer would refrain from violating the law until directly ordered to do so.

The Commission should conduct a rulemaking to address this deficiency in the program access rules and the related issues identified in the Petition of Ameritech New Media.

Respectfully submitted,

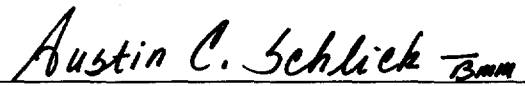
JODI BRENNER  
1880 Campus Commons Drive  
Reston, VA 20191-1512  
(703) 295-4342

LESLIE A. VIAL  
1320 North Court House Rd.  
8<sup>th</sup> Floor  
Arlington, VA 22201  
(703) 974-2819

*Counsel for Bell Atlantic Video Services  
Company*

RICHARD G. WARREN  
1095 Avenue of the Americas  
New York, NY 10036  
(212) 395-2376

*Counsel for NYNEX Corporation*

  
AUSTIN C. SCHLICK  
KELLOGG, HUBER, HANSEN,  
TODD & EVANS, P.L.L.C.  
1 Logan Square, 12<sup>th</sup> Floor  
Philadelphia, PA 19918  
(215) 864-7270

*Counsel for Bell Atlantic and NYNEX*

July 17, 1997

## **CERTIFICATE OF SERVICE**

I certify that on this 17th day of July 1997, a copy of the foregoing **Reply Comments of Bell Atlantic and NYNEX** was caused to be served via hand delivery and/or first class mail, postage prepaid on the following:

**\*Chairman Reed E. Hundt**  
Federal Communications Commission  
1919 M Street, N.W., Room 814  
Washington, D.C. 20554

**\*Commission James H. Quello**  
Federal Communications Commission  
1919 M Street, N.W., Room 814  
Washington, D.C. 20554

**\*Commissioner Rachelle B. Chong**  
Federal Communications Commission  
1919 M Street, N.W., Room 814  
Washington, D.C. 20554

**\*Commissioner Susan Ness**  
Federal Communications Commission  
1919 M Street, N.W., Room 814  
Washington, D.C. 20554

**\*Meredith Jones**  
Chief, Cable Services Bureau  
Federal Communications Commission  
2033 M Street, N.W., Room 918  
Washington, DC 20554

**\*Deborah E. Klein**  
Assistant Division Chief  
Consumer Protection & Competition Div.  
Federal Communications Commission  
Cable Services Bureau  
2033 M Street, N.W., Suite 700  
Washington, D.C. 20054

**\*Jane E. Logan**  
Deputy Chief  
Cable Services Bureau  
Federal Communications Commission  
2033 M Street, N.W., Room 900  
Washington, DC 20554

Deborah H. Morris  
Ameritech New Media, Inc.  
300 South Riverside Plaza  
Suite 1800  
Chicago, IL 60606

**\*Lawrence R. Sidman**  
Jessica A. Wallace  
Verner, Liipfert, Bernhard,  
McPherson & Hand, Chtd.  
901 - 15<sup>th</sup> Street, N.W., Suite 700  
Washington, D.C. 20005

Craig A. Newman  
Bruce D. Gellman  
10880 Wilshire Boulevard, Suite 1750  
Los Angeles, CA 90024

**\*Jonathan D. Blake**  
Kurt A. Wimmer  
Erin M. Egan  
Covington & Burling  
1201 Pennsylvania Avenue, N.W.  
Washington, D.C. 20004

**\*Gary M. Epstein**  
James H. Barker  
Latham & Watkins  
1001 Pennsylvania Avenue, N.W.  
Suite 1300  
Washington, D.C. 20004

**\*Brian Conboy**  
Michael Hammer  
Michael Finn  
Wilkie Farr & Gallagher  
Three Lafayette Centre  
1155 21<sup>st</sup> Street, N.W.  
Washington, D.C. 20036

\*Daniel L. Brenner  
Diane B. Burstein  
1724 Massachusetts Avenue, N.W.  
Washington, D.C. 20036

\*Howard J. Symons  
Michael B. Bressman  
Mintz, Levin, Cohn, Ferris,  
Glovsky & Popeo, P.C.  
701 Pennsylvania Avenue, N.W.  
Suite 900  
Washington, D.C. 20004

\*Arthur H. Harding  
Seth A. Davidson  
Fleischman and Walsh, L.L.P.  
1400 Sixteenth Street, N.W.  
Suite 600  
Washington, D.C. 20554

\*Paul J. Sinderbrand  
Robert D. Primosch  
Wilkinson, Barker, Knauer & Quinn  
1735 New York Avenue, N.W.  
Suite 600  
Washington, D.C. 20006

\*ITS  
2100 M Street, N.W.  
Room 140  
Washington, D.C. 20037

  
Bernadette Murphy

\*By Hand Delivery